In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-20-00230-CV

ALBERT THATCHER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court at Law No. 1
McLennan County, Texas
Trial Court No. 20200673CV1, Honorable Vik Deivanayagam, Presiding

December 4, 2020

OPINION

Before QUINN, CJ., and PIRTLE and DOSS, JJ.

The government's forcible injection of antipsychotic medication into a nonconsenting person awaiting his criminal trial represents a substantial interference with that person's liberty interests and has the potential to violate rights protected under the Fourteenth Amendment to the United States Constitution. *Sell v. United States,* 539 U.S. 166, 178, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003); *Riggins v. Nevada,* 504 U.S. 127, 135, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992). The State may be able to overcome these interests by presenting clear and convincing evidence that the antipsychotic

medication was medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, in light of less intrusive alternatives, that such medication was essential for the individual's own safety or the safety of others. *Sell,* 539 U.S. at 179. In Texas, the Legislature enacted Chapter 574 of the Health and Safety Code to guide the elements the State must prove before a court may order administration of psychoactive medication for certain individuals. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.101-.110 (West 2017 & Supp. 2020).

In this accelerated appeal,[1] appellant pretrial detainee, Albert Thatcher, challenges the trial court's order authorizing involuntary administration of psychoactive medication.[2] Through two issues, Thatcher challenges the sufficiency of the evidence supporting the order and argues he was denied due process when the trial court refused to consider certain evidence he sought to present. Because we agree with Thatcher that the evidence was legally insufficient to support the order, we reverse and render an order that the State's application is denied.

Background

On July 30, 2020, the State filed a document in the McLennan County Court at Law entitled "Application for Order to Authorize Psychoactive Medication."[3] According to

[1] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 574.108(a), 574.070(e) (West 2017).

[2] Originally appealed to the Tenth Court of Appeals, this case was transferred to this Court pursuant to a docket equalization order entered by the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

[3] An application initiating the procedure here on appeal is filed in a probate court or a court with probate jurisdiction. TEX. HEALTH & SAFETY CODE ANN. § 574.104(a). In McLennan County, probate jurisdiction of the statutory county court is concurrent with the

the document, Thatcher had been charged by indictment in the district court with aggravated assault with a deadly weapon. The district judge found Thatcher incompetent to stand trial and ordered him committed to a facility designated for competency restoration. The State requested the county court at law appoint a physician to examine Thatcher and to "issue a certificate of medical examination containing the information required by section 574.104 of the Health and Safety Code regarding whether an order authorizing involuntary administration of psychoactive medication is appropriate or necessary."

On the same day, the county court at law signed an order appointing Dr. Stephen Mark to conduct a medical examination of Thatcher and to provide a document providing an opinion regarding whether the involuntary administration of psychoactive medication is appropriate or necessary. Four days later, on August 3, Dr. Mark filed a document entitled "Certificate of Medical Examination for Involuntary Administration of Psychiatric Medication." The document largely consisted of pre-printed conclusions with check-boxes, and some blanks to be filled-in.

Later in the same day as Dr. Mark's filing, the judge of the county court at law convened a hearing via Zoom on the State's application. The court announced sua sponte that it was taking "judicial notice" of Dr. Mark's certificate "and all of the contents

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county court. TEX. GOV'T CODE ANN. § 25.0003(d) (West 2019); *In re Carroll,* No. 10-12-00043-CV, 2012 Tex. App. LEXIS 1276, at *1-2 (Tex. App.—Waco Feb. 15, 2012, orig. proceeding) (mem. op.) (so explaining).

contained within the file."[4] Following a discussion between the court and the State's counsel summarizing the motion, Thatcher voluntarily testified.

Thatcher challenged the effectiveness of the proposed medication, opining that he suffered from a lack of protein. Thatcher also indicated an objection to the medication, elaborating that he wanted his brain and body "to heal naturally from whatever it might go through and have an all natural diet, not use various drugs that Western medicine wants to put in you, which for a short term may do good but for a long term may have any number of bad effects."

The State did not cross-examine Thatcher, and no party presented any further evidence. The same day, the court signed an order containing findings, and ordering that the "McLennan County Jail or designee is hereby authorized to administer the following psychoactive medications to [Thatcher] regardless of his refusal: Haldol D, 50 mg/mL, every 4 weeks, or Abilify, per whatever a treating physician orders, as well as a mood stabilizer, anti[-]aggressive medication, such as Trileptal." Thatcher's motion for new trial was overruled by order signed on August 7. This appeal followed.[5]

[4] Based on the record filed with us, at the time of the hearing the clerk's file contained the State's application, the order appointing Dr. Mark, an order setting hearing of the State application, and Dr. Mark's certificate.

[5] Thatcher filed a pro se notice of appeal. We abated and remanded the case for appointment of counsel. *Thatcher v. State,* No. 07-20-00230-CV, 2020 Tex. App. LEXIS 7499 (Tex. App.—Amarillo Sep. 16, 2020, per curiam order); TEX. HEALTH & SAFETY CODE Ann. § 574.105(a)(1) (West 2017) (providing for appointment of counsel). Following that appointment, the case was reinstated.

Analysis

In his first issue, Thatcher argues that the county court at law's order authorizing administration of psychoactive medication is unsupported by legally or factually sufficient evidence. We agree.

Here, the State sought an order authorizing the involuntary administration of psychoactive medications to Thatcher under Chapter 574 of the Texas Health and Safety Code. The State was thus required to prove:

> (1) that the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient; or
>
> (2) if the patient was ordered to receive inpatient mental health services by a criminal court with jurisdiction over the patient, that treatment with the proposed medication is in the best interest of the patient and either:
>
> > (A) the patient presents a danger to the patient or others in the inpatient mental health facility in which the patient is being treated as a result of a mental disorder or mental defect as determined under Section 574.1065; or
> >
> > (B) the patient:
> >
> > > (i) has remained confined in a correctional facility . . . for a period exceeding 72 hours while awaiting transfer for competency restoration treatment; and
> > >
> > > (ii) presents a danger to the patient or others in the correctional facility as a result of a mental disorder or mental defect as determined under Section 574.1065.

TEX. HEALTH & SAFETY CODE ANN. § 574.106(a-1) (West 2017). The trial court must also consider evidence of numerous factors before making findings regarding the patient's dangerousness and best interests. *See id*. §§ 574.106, 574.1065.

The State must prove its case by clear and convincing evidence. TEX. HEALTH & SAFETY CODE Ann. § 574.106(a-1). Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *State v. K.E.W.,* 315 S.W.3d 16, 20 (Tex. 2010). Under the clear and convincing standard, a reviewing court applies a heightened standard of review to sufficiency of the evidence challenges. *See In re C.H.,* 89 S.W.3d 17, 25 (Tex. 2002). Evidence that merely exceeds a scintilla is not legally sufficient when the burden of proof at trial is clear and convincing. *See In re J.F.C.,* 96 S.W.3d 256, 264-65 (Tex. 2002). The Tyler Court of Appeals has held that physician testimony is necessary for satisfying the clear and convincing evidence standard required under Chapter 574. *State ex rel. E.G.*, 249 S.W.3d 728, 731-32 (Tex. App.—Tyler 2008, no pet.).

When reviewing a legal insufficiency challenge when the standard at trial required proof by clear and convincing evidence, we review all the evidence in the light most favorable to the finding to determine whether a reasonable factfinder could have formed a firm belief or conviction that the finding was true. *In re J.F.C.,* 96 S.W.3d at 266. We resolve disputed fact questions in favor of the finding if a reasonable factfinder could have done so. *City of Keller v. Wilson,* 168 S.W.3d 802, 817 (Tex. 2005); *In re J.F.C.,* 96 S.W.3d at 266.

We hold that the State failed to present any evidence of its required elements, notwithstanding the trial court taking "judicial notice" of Dr. Mark's report. Rule of Evidence 201 permits a court to judicially notice adjudicative facts that are not subject to

reasonable dispute because they are either generally known within the trial court's territorial jurisdiction or capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned. TEX. R. EVID. 201. "[A]djudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." *In re Graves,* 217 S.W.3d 744, 750 (Tex. App.—Waco 2007, orig. proceeding) (quoting 1 Steven Goode et al., GUIDE TO THE TEXAS RULES OF EVIDENCE § 201.2 (3d ed. 2002)).

It was not improper for the county court at law to take judicial notice that Dr. Mark's certificate was filed with the county clerk. However, the trial court's decision to do so did not relieve the State of its burden to present evidence regarding the elements required under Chapter 574. *In re A.D.,* Nos. 02-19-00380-CV, 02-19-00381-CV, 2019 Tex. App. LEXIS 11296, at *12 (Tex. App.—Fort Worth Jan. 7, 2019, no pet.) (mem. op.) (concluding in review of orders under §§ 574.034(a) (involuntary commitment) and 574.106(a-1), "[e]ven though the trial court took judicial notice of the certificates of medical examination and the ATR [alternative treatment recommendation], we may not consider those in our sufficiency review because they were not admitted into evidence at the hearing.") (citing *In re A.J.W.,* Nos. 02-15-00028-CV, 02-15-00029-CV, 2015 Tex. App. LEXIS 2921, at *7-8 (Tex. App.—Fort Worth Mar. 26, 2015, pet. denied) (mem. op.) (concluding in review of orders under §§ 574.034(a) and 574.106(a-1) that while trial court could take judicial notice that certain documents were part of the court's file, it could not properly take judicial notice of the truth of any allegations contained in the documents); *In re S.M.P.,* No. 10-19-00466-CV, 2020 Tex. App. LEXIS 5061, at *6 n.1 (Tex. App.—Waco July 6, 2020, no

pet.) (mem. op.) (refusing to consider affidavit in clerk's record of which trial court took judicial notice in termination of parental rights case and explaining "while a court may judicially notice the existence of an affidavit in its file, it may not take judicial notice of the truth of the factual contents contained there." (quotation marks, bracketing, and citation omitted)); *Davis v. State,* 293 S.W.3d 794, 797-98 (Tex. App.—Waco 2009, no pet.) ("while a court may judicially notice the existence of an affidavit in its file, it may not take judicial notice of the truth of the factual contents contained therein.") (citations omitted)). The failure to present clear and convincing evidence requires reversal of the order and rendition that the State's application is denied.

We sustain Thatcher's legal sufficiency challenge. It is unnecessary to consider his factual sufficiency complaint or other issue. TEX. R. APP. P. 47.1.

Conclusion

We reverse the trial court's order authorizing psychoactive medication and render an order denying the State's application for order to authorize psychoactive medication.

Lawrence M. Doss
Justice